I also have in mind what the Privy Council said in the case of *In re MacManaway*[10] which involved interpretation of section 4 of the House of Commons (Clergy Disqualification) Act, 1801 ... "The meaning which these words ought to be understood to bear is not to be ascertained by any process akin to speculation: the primary duty of a court of law is to find the natural meaning of the words used in the context in which they occur, the context including any other phrases in the Act which may throw light on the sense in which the makers of the Act used the words in dispute."

Applying this canon of construction and having the ones previously set out in mind, it seems to me to be abundantly clear that the opening words of section 2(2) of the Ordinance, "without prejudice to the generality of the powers conferred by the preceding subsection" is unequivocal in its meaning, and cannot be restricted to those regulations subsequently particularised in subsections (2)(a) to (2)(p) of the same section. To hold otherwise would be to defeat the manifest intention of the regulation, expressed in the clearest possible terms.

In any case subsection (2)(j) which was completely overlooked by counsel on both sides when they made their submissions, has, as the Lord President said in his judgment expressly empowered His Majesty to make essential regulations amending the law, suspending the operation of any written law and applying any written law with modification.

Clause (3) of article 150 of the Constitution states that a Proclamation of Emergency and any Ordinance promulgated under Clause (2) shall be laid before both Houses of Parliament and, if not sooner revoked, cease to have effect if resolutions are passed by both Houses annulling such Proclamation or Ordinance. The ultimate right to decide if an Emergency exists or has ceased to exist therefore remains with Parliament, and it is not the function of any court to decide on that issue.

Those of us who have misgivings about the sweeping powers which become vested in the Yang Dipertuan Agung (and in effect, in the Executive) after a Proclamation of Emergency, can find solace in the knowledge that the very institutions of Parliamentary democracy which we cherish can be destroyed overnight were it not for such emergency powers which the drafters of our Constitution, in their wisdom, had seen fit to embody therein. The niceties of Parliamentary democracy is a luxury which our Founding Fathers were well aware, is quite unsuited to cope with sudden national crises, which may, as in the case of the May 13th tragedy erupt with scant warning. One could only conjecture what the consequences would have been had not the Crown (and therefore the Executive) been provided with this effective remedy to nip anarchy in the bud, and then to give the body politic time to recuperate from the hurly burly of turmoil and when whole again to return to the gentler paths of parliamentary rule.

Order accordingly.

Solicitors: *Wilson & Co.*

MACON WORKS & TRADING SDN. BHD. v. PHANG HON CHIN & ANOR.

[O.C.J. (Hashim Yeop A. Sani J.) August 28, 1975]
[Ipoh — Civil Suit No. 164 of 1974]

Contract — Option — Option to purchase — Plaintiffs exercised option through defendants' solicitor — No consideration paid — Claim for specific performance of agreement resulting from exercise of option — Defendants claimed, inter alia, no privity of contract — Defendants alleged option had expired — Date of option and date of its expiry in issue.

The defendants were owners of a piece of land. Their first agreement to sell the said land to one Loong Koi was abortive and the defendants enlisted the assistance of the solicitor for Loong Koi to find a purchaser for the land. An option was given to purchase the land to one Madam Kong Yoke Sam.

The option was an open dated one exercisable only after Loong Koi showed no more interest in the land. The plaintiffs exercised the option through the said solicitor and claimed for specific performance of the agreement. The defendants resisted the claim and argued, *inter alia,* that there was no privity of contract or any contractual relationship between them and the plaintiffs. The defendants further claimed that the option had expired and even if the plaintiffs had exercised the option within the prescribed period, the option was not valid due to lack of consideration. The plaintiffs lodged a caveat against the defendants' land.

Held: (1) the option was void for lack of consideration;

(2) as far as the National Land Code is concerned the whole system of caveats is founded on the principle that they exist for the protection of *alleged* as well as proved interest. In this case, no action had been taken by the defendants to remove the caveat on the grounds that the plaintiffs had no interest in the terms of the National Land Code 1965 for capacity to lodge the caveat;

(3) the arguments of the defendants based on the lack of privity of contract cannot therefore succeed;

(4) since no time was fixed, the offer would lapse after the expiration of a reasonable time. An offer lapses after a reasonable time not because this must be implied in the offer but because failure to accept within a reasonable time implies rejection by the offeree;

(5) the court can take into account the conduct of the parties after the offer was made in deciding whether the offeree has allowed too long a time to lapse before accepting;

(6) the option had been revoked well before the purported intention to exercise the option;

(7) the plaintiffs, therefore cannot succeed in their present action and the caveat should be removed forthwith.

Cases referred to:—

(1) *Turner* v. *Forwood* [1951] 1 All E.R. 746.

(2) *Clifford* v. *Turrel* (1841) 1 Y. & C. Ch. Cas. 138; 62 E.R. 826; affd., (1845) 14 L.J. Ch. 390; 5 L.T.O.S. 281.

(3) *Currie* v. *Misa* (1875) L.R. 10 Ex. 153.

(4) *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847.

(5) *Bourne* v. *Mason* (1668) 1 Ventris 6.

(6) *Beswick* v. *Beswick* [1968] A.C. 58 at pg. 93.

(7) *Midland Silicones Ltd.* v. *Scruttons Ltd.* [1962] A.C. 446.

(8) *Mahadevan & Anor.* v. *Patel* [1975] 2 M.L.J. 207.

(9) *Jit Kaur* v. *Parl Singh* [1974] 2 M.L.J. 199, 201 col. 1 at top A to D.

(10) *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh* [1970] 1 M.L.J. 145, line C; p. 146, 2nd col. D.

(11) *Inter-Continental Mining Co. Sdn. Bhd.* v. *Societe Des Etains De Bayas Tudjuh* [1974] 1 M.L.J. 145.

(12) *Khatijabai Jiwa Hasham* v. *Zenab* [1960] A.C. 317.

CIVIL SUIT.

H.R. Sankey for the plaintiffs.

S.A. Lingam for the defendants.

Hashim Yeop A. Sani J.: The dispute in this case centres around a written option to purchase a piece of land given by the first defendant on his behalf and also on behalf of the second defendant (by a power of attorney) to one Madam Kong Yoke Sam. Copies of this option are at pages 6 and 7 of the Agreed Bundle. The option was executed in the office of PW1, a practising lawyer, sometime towards the end of 1973. The date on which the option was executed and the date on which the option was to expire were among the issues in dispute.

Due to the complexity of the background to this case it is essential that a summary of the facts that would seem to have been established or admitted is set out first. The land in question is a piece of land held under and comprised in Surat Hakmilek Sementara No. H.S. (D) KA. 691/73 for Lot No. 66133 in the Mukim of Ulu Kinta comprising an area of 2.108 acres approximately. At all material times the registered owners of this land were the first and second defendants. On October 16, 1972 an agreement was executed between the defendants and one Loong Koi *alias* Loong Khui wherein it was agreed between them that the defendants would sell to Loong Koi the said land at the agreed price of $36,000. A copy of this agreement is at page 1 of the Agreed Bundle. This agreement will be referred to as the "agreement" in this judgment. Under the agreement a sum of $2,000 was paid to defendants by way of deposit by the intended purchaser and the balance of $34,000 would be paid after payment of dues to the Collector of Land Revenue and upon execution of a valid and registrable transfer in respect of the land in favour of Loong Koi or his nominee or nominees free from all encumbrances. Apparently there was no progress on the agreement until November 9, 1973 when PW1, as solicitors to Loong Koi wrote to the first defendant stating that an amount of $24,824.70 had actually been expended by Loong Koi. A copy of this letter is at page 5 of the Agreed Bundle. On December 8, 1973 PW1 again as solicitors to Loong Koi wrote to first defendant stating that Loong Koi had instructed for the settlement of the amount of $24,824.70 from the first defendant within seven days from the date thereof. A copy of this letter is at page 8 of the Agreed Bundle. On December 18, 1973 PW1 again wrote to first defendant stating that since the first defendant had failed to comply with the previous letter demanding settlement of the sum, Loong Koi had rescinded and revoked the said letters and thereby given notice that he wished to complete the agreement. This letter also required the first defendant to obtain permission from the Mentri Besar for approval of the transfer in accordance with the express condition in the title. (9 in Agreed Bundle). In reply to these letters the first defendant wrote to PW1 stating that he was already making arrangement to sell the said land to an intending purchaser after receiving PW1's letter of December 8, 1973. He had also written for permission of the Mentri Besar for the transfer of the land which he said would take about 3 to 6 months before the permission was granted. Therefore he requested that Loong Koi would have to wait between 3 to 6 months before he could refund the money to him. (See 10 in Agreed Bundle.) Two days after this letter of the first defendant PW1 wrote again to Loong Koi on December 31, 1973 copied to the first defendant. The interesting thing about this letter is that it only asked Loong Koi to come to the office of PW1 to collect the sum of $24,824.70 (11 in Agreed Bundle). A week after that first defendant wrote to PW1 on January 7, 1974 stating to the effect that he was surprised about the previous letter of PW1 since he had not deposited any sum with PW1 (12 in Agreed Bundle). Three days after this letter was written PW1 again wrote to first defendant on January 10, 1974 stating this time that his client Loong Koi prefers to complete the agreement and does not wish to have the refund (12A in Agreed Bundle). There was a reply to that by the first defendant (13 in Agreed Bundle) which is not material. On February 11, 1974 PW1 wrote again to first defendant and also to second defendant that the nominees of Madam Kong Yoke Sam would want to exercise the option to purchase the said land. The letter also said that the full amount of the purchase price had in fact been deposited with PW1. The letter also asked both the defendants to call at PW1's office within four days from the date thereof to execute the Memorandum of Transfer. The defendants never complied with this notice until today. There was an exchange of further letters between PW1, the first defendant and the solicitors to the present plaintiff which I need not go into.

Two copies of an option were exhibited in the Agreed Bundle (6 and 7). In the copy at page 6 the date the option was executed is shown as "9th day of November, 1973" and the date the option expired is shown as "9th day of December, 1973." This copy is from the first defendant. The copy of the option at page 7 shows the date that the option was executed as "9th day of December, 1973" and the date the option expired as "28th February, 1974". This copy is from PW1.

According to the evidence of PW1 the first defendant called on him at his office a few days after November 12, 1973 *i.e.* a few days after he sent the letter dated November 9, 1973 informing the first defendant of the amount which had been expended by his client Loong Koi. According to PW1 while in his office for about four to five minutes first defendant (who according to him could speak both English and Cantonese) asked him if PW1 had any intended purchaser to take over the land. According to PW1 the first defendant also asked him if he was interested to help to dispose of the land and if so, he (first defendant) could give an option. As a result first defendant gave a written option in favour of one Madam Kong Yoke Sam. It transpired in evidence that Madam Kong Yoke Sam was the wife of PW1 but who was not present then. It is from this point that PW1's version differs drastically from that of the first defendant on what actually took place. According to PW1 the option was given indefinitely but could be exercised after his client, Loong Koi, showed no more interest in the agreement. The date on the option was left blank both as to date of execution as well as to date of expiry but "9th December, 1973" was inserted by him at random

on February 11, 1974. He said he did not however know that December 9, 1973 was a Sunday according to the calendar and that the first defendant was somewhere in Kuala Krai on that date. The significance of the date February 11, 1974 on which date PW1 said he inserted the date December 9, 1973 on the option paper can probably be related to a letter dated February 11, 1974 sent by PW1 to both defendants notifying them that the nominees of Madam Kong Yoke Sam would want to exercise the option (14 in Agreed Bundle). According to him he was approached by the plaintiff company sometime on December 21, 1973 although they had deposited the money with him much earlier. He said he did not know why his client Loong Koi kept changing his mind but Loong Koi appeared to be satisfied after being paid off with the money which he had expended. I think it can safely be inferred that the money paid off to Loong Koi must have been obtained by PW1 from the plaintiff company who was interested to purchase the land. In the copy of the option produced by PW1 the date of expiry of the option is shown as February 28, 1974. I have found no explanation why it should be February 28, 1974 and not any other date because he himself said it was an open dated option although there is evidence in the letter of PW1 to the defendants (at page 14 of the Agreed Bundle) that the plaintiff company "would want to exercise the option" on February 11, 1974. On the other hand there is evidence also from PW1's own testimony that when he filled the date on February 11, 1974 he put the dates "unilaterally" and the dates were not given by the first defendant. According to him it was all based on the understanding that he could exercise the option as long as his client Loong Koi showed no interest anymore in the land.

The version of the first defendant as to the dates of the option was entirely different. He said he went to PW1's office on November 9, 1973. After PW1 said he could help him to find a purchaser three copies of the option were prepared which the first defendant signed on his behalf as well as that of the second defendant. PW1 gave him a copy of the option but undated. Before leaving PW1's office he said he told PW1 that the option was only for one month and he wrote November 9, 1973 on his copy expiring on December 9, 1973 but he did not insert these dates on the two copies held by PW1. He did not agree, he said, as to any other dates. He never saw Madam Kong Yoke Sam any time in his life and he never received $1 as consideration for the option. This last bit was however not denied by PW1. He denied that he saw PW1 only after December 12, 1973. He said PW1 asked him to give the option because PW1 said his client Loong Koi declined to take the land as there was a restriction in the title. The first defendant also said that PW1 asked him to give the option so that he could persuade his client to give up the agreement. He said the option was given before the demand was made by Loong Koi to him to settle the amount expended. He said he did not put the date on the original because he trusted PW1. He went to PW1's office not as a result of any letter but because he received a phone call from Loong Koi to say he was going overseas and first defendant should see PW1 to settle the matter. According to first defendant on November 9, 1973 itself PW1 indicated to him that Loong Koi was no longer interested in the land because of the restriction in the title. First defendant wrote to the solicitors for the plaintiff in 18 in Agreed Bundle showing his version of the sequence of events: on December 8, 1973 PW1 wrote to him to refund the sum expended by Loong Koi in order to dissolve the agreement; on December 18, 1973 PW1 again wrote to him stating that Loong Koi wanted to proceed with the agreement. On December 31, 1973 PW1 again wrote to him asking Loong Koi to collect the sum of $24,824.70 and also to execute the transfer in favour of Madam Kong Yoke Sam instead of Loong Koi. The latter part however is not borne out by any document. He refused to comply with the letter because he said the agreement had already been dissolved and the option had already expired. On January 10, 1974 he again received another letter from PW1 informing him that Loong Koi did not want the refund now but preferred to complete the agreement.

It is now established that the defendants finally entered into another agreement with one Syarikat Sri Lela Sendirian Bhd. on the sale of the land. According to his own evidence the first defendant said he finally tied up with this company sometime in August 1974 when he entered into proper agreement. According to 19 in Agreed Bundle the approval of the Mentri Besar was obtained for the sale and this approval was granted on November 25, 1974. In the meantime the plaintiff lodged a caveat against the land *vide* Private Caveat 842/74 and on June 9, 1975 the caveat was extended and to remain in force until the final determination of the present suit.

The plaintiff company is claiming for specific performance of the agreement resulting from the exercise of the said option and that the defendants be ordered to execute all documents as may be necessary to carry out the terms of the agreement resulting from the exercise of the said option. The defendants are resisting the claim by pleading a number of defences, viz. — (a) that the option had expired long before the purported exercise of the option; (b) that there is no privity of contract or any contractual relationship whatsoever between them and the plaintiff; (c) that even if the purported exercise of the option was within the period prescribed in the option, the option was not valid due to lack of consideration; and finally (d) that the express condition on the title of the land would by its nature preclude specific performance.

Despite the complicated background of this dispute it would be possible to reduce the issues as follows: —

(a) What were the most probable dates of commencement and expiry of the option?

This is a question of fact and in my view a finding to be based substantially on the credibility of the respective witnesses.

(b) Having determined the issue in (a) and if it is in favour of the plaintiff whether the option would in any case be invalid because either

(i) of lack of consideration and/or lack of privity of contract between the plaintiff company and the defendants; or

(ii) of the nature of the restriction in the title (that the land is subject to an express condition that it cannot be sold, leased, transferred, charged or dealt with except to a person or persons approved in writing by the Mentri Besar, Perak), as would preclude specific performance.

These are questions of law. Unfortunately in this regard neither counsel offered such assistance.

First on the question of the probable date of execution of the option. On this question I tend to believe the version of the first defendant as the more probable one based on the following considerations. The first defendant's version is that he went to PW1's office on November 9, 1973 on being requested by Loong Koi to settle the matter with PW1. It is also in the testimony of the first defendant that it was on November 9, 1973 in PW1's office that it was indicated by PW1 to him that Loong Koi might not be interested in the land because of the existence of the restrictive condition in the title. It is to be noted that all letters sent by PW1 to the first defendant were by way of A.R. registered post except the letter dated November 9, 1973 informing the first defendant of the amount actually expended by Loong Koi and the copy of the letter dated December 21, 1973 addressed to Loong Koi for the collection of the sum of $24,824.70. This strikes me as important and it seems highly probable that the letter dated November 9, 1973 was sent after the meeting between PW1 and first defendant and not before. The next probable date would seem to be anytime after the receipt by the first defendant of the letter demanding settlement of the amount of $24,824.70 dated December 8, 1973 but this was not in accordance with the evidence of PW1 himself who maintained that the first defendant came to his office a few days after November 12, 1973. Furthermore, December 9, 1973 as the date of execution of the option is entirely unacceptable both to logic because that date was a Sunday and the fact that on that date first defendant was in Kuala Krai was not challenged. PW1 also admitted that he inserted December 9, 1973 "at random" for no apparent reason. Therefore November 9, 1973 was in my view the most probable date the option was actually executed.

As to the date of expiry of the option the version that it was an open dated option would seem to be the more probable one based on the following considerations of the evidence. I would however qualify this in that there was a condition that the option would be exercisable only if Loong Koi showed no more interest in the land. This is in PW1's own testimony itself. One thing is clear and that is that Loong Koi finally disappeared from the dispute after being paid off with the amount he had expended. It would seem clear that Loong Koi was vacillating as expressed in the letters written by PW1 to the first defendant, namely letter dated December 8, 1973 (8 in Agreed Bundle), letter dated December 18, 1973 *i.e.* only 10 days after the first letter (9 in Agreed Bundle) and letter dated January 10, 1974 (12A in Agreed Bundle). In the first letter (8 in Agreed Bundle) Loong Koi asked for the settlement of the amount within 7 days thereof. In the second letter (9 in Agreed Bundle) Loong Koi appeared to want to complete the agreement dated October 16, 1972 and in the third letter (12A in Agreed Bundle) it categorically stated that Loong Koi preferred to complete the transaction and did not wish to have the refund. The mystery of this apparent vacillation seems to deepen further when one sees another letter dated December 31, 1973 (11 in Agreed Bundle) *i.e.* in between the second letter and the third letter referred to earlier. In this letter PW1 wrote to Loong Koi to call at his office to collect the sum of $24,824.70. But this mystery is somewhat resolved if one accepts the testimony of the first defendant that it was on November 9, 1973 itself that it was indicated by PW1 that Loong Koi was not really interested in the land because of the restrictive conditions of the title and that PW1 could as solicitors to Loong Koi help to persuade Loong Koi from pursuing with the matter upon payment of the amount expended by him. As I referred to earlier, PW1 himself stated in his testimony that the monies had been deposited by the plaintiff company with him before December 21, 1973 and it can safely be inferred that it was from this deposit that Loong Koi was finally paid off with the amount he had expended. It is not my intention to divert to the question of ethics in this judgment. But suffice to say that because of the delicate position of PW1 who while being solicitors to Loong Koi obtained the option in question in respect of the same land it would be reasonable to believe that there must have been some sort of understanding between him and the first defendant on November 9, 1973 that the option would not be exercised until after Loong Koi was cleared off the deck, so to speak. The obvious and most logical thing that could have been agreed between these two was that the expiry date of the option should be left blank and the option to be exercised after Loong Koi showed no more interest. The expiry date December 9, 1973 would not be reasonable for the reasons stated earlier and the expiry date February 28, 1974 would have no basis whatsoever. In arriving at this conclusion I have totally ignored a letter dated December 3, 1973 purportedly sent by first defendant to PW1 asking him to inform Madam Kong Yoke Sam to exercise the option before the expiry date December 9, 1973. A letter as important as this could not have been forgotten and omitted in the affidavit of the first defendant sworn on February 18, 1975 where the first defendant tendered a number of other important documents. The explanation by the first defendant in his testimony is that the affidavit was prepared by his solicitors and he left it entirely to his solicitors. I do not think first defendant should be believed in this respect because he did not seem to rely on any solicitors for his various replies to PW1 contained in the Agreed Bundle and there is every indication to show that the first defendant is a person who has been very alert indeed to everything pertaining to his affairs.

Having made the finding that the option was executed on November 9, 1973 and that it was an undated and open option subject to the qualification

as to time of exercise I will now deal with the other issues.

It is the contention of the defendants that the option is in any case invalid because of lack of consideration. Alternatively it is the contention of the defendants that there is no privity of contract or any contractual relationship between the defendants and the plaintiff company. The option was given to one Madam Kong Yoke Sam through PW1 and neither Madam Kong Yoke Sam nor PW1 is suing the defendants. Finally it is also the contention of the defendants that the express condition in the title of the land would by its nature preclude specific performance. It is obvious that if the answer to the first or the second question is in the affirmative it would no longer be necessary to consider the third question. First the question of consideration. Although the plaintiff company in their statement of claim are asking for specific performance of the agreement "resulting from the exercise of the said option" there is no doubt that the basis of their claim is the option itself. In simple terms, an option is a right conferred by agreement to buy or not at will any property within a certain time.

In the option the following words are clearly set out namely "We, the undersigned hereby acknowledge receipt from Madam Kong Yoke Sam the sum of Dollar One ($1) only being consideration for this option to purchase the property...." The sum of $1 is indeed a nominal consideration which is quite normal in an option of this nature. In *Turner* v. *Forwood*[1] Lord Goddard reiterated what the settled rule was in relation to a nominal consideration and he said at page 747:

"*Clifford* v. *Turrel*[2] appears to lay down in the clearest possible terms that, at any rate, where there is a nominal consideration — and I am not satisfied that it is confined to cases of nominal consideration — evidence is always admissible to show that the true consideration was something more than the consideration stated in the written agreement, be it under hand or under seal. Lord Lyndhurst L.C., said (14 L.J. Ch. 397):

'... the settled rule of law is, that you may prove a further consideration which is consistent with the consideration stated on the face of the deed. You cannot be allowed to prove a consideration inconsistent with it, but you may prove another which stands with it'."

At page 749 Singleton L.J., also said:

"If, on the face of a document such as this, it appears that the consideration is no more than nominal, it seems to me that the court is entitled to hear evidence of the true circumstances and the true consideration."

It was however admitted by both parties that the first defendant never saw Madam Kong and that the $1 said to be acknowledged in the option was never paid or received. It has transpired in the evidence that Madam Kong was the wife of PW1, who prepared the option. However under the circumstances it can perhaps be inferred that PW1 at the time of executing the option acted as agent for and on behalf of Madam Kong Yoke Sam.

The classic statement about what is consideration is that contained in *Currie* v. *Misa*[3] that "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forebearance, detriment, loss or responsibility given, suffered or undertaken by the other." An alternative approach is to define consideration in terms of purchase and sale, the consideration being the price of the promise. This is the view put forward by Sir Frederick Pollock which definition was approved by the House of Lords in *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.*[4] as follows: —

"An act of forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."

An agreement without consideration is void unless it comes under one of the exceptions in section 26 of our Contracts Act, 1950. None of the exceptions would seem to apply here and therefore upon the admission of PW1 himself there was no consideration as acknowledged in the option. Copies of the option bearing those words referred to above were exhibited in the Agreed Bundle of Documents and there is nothing to suggest in the pleadings that there is any other consideration except that disclosed in the option itself. Therefore confining oneself to the face value of the option there is no doubt whatsoever that the option is void for lack of consideration.

It is also the contention of the defendants that there is no privity of contract or any contractual relationship whatsoever between the plaintiff company and the defendants. The position at common law on this point would seem to have been settled as early as *Bourne* v. *Mason*[5] — see Chitty on Contracts, 22nd Edition, page 395. A plaintiff was nonsuited because he "did nothing of trouble to himself or benefit to the defendant, but is a mere stranger to the consideration." Although this was the rule at common law the courts continued to be influenced by the equitable view that consideration might be provided by natural love and affection. But for this exception it is now well established that no stranger to the consideration can take advantage of a contract although made for his benefit. In *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd., supra* the rule that no one except a party to a contract could enforce it was affirmed in the House of Lords.

In the case of *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd., supra* both the questions of consideration and privity of contract came to be dealt with although the crux of the problem in that case was whether the plaintiffs were undisclosed principals. In that case D & Co., who were motor accessory factors, agreed with the plaintiffs, who were motor tyre manufacturers, in consideration of the plaintiffs' allowing them certain discount, to buy a given quantity of the plaintiffs' goods within a specified period. There were also other undertakings in the agreement. The plaintiffs exacted similar agreements from all their trade purchasers, and this was known to the defendants, who were large store-keepers and sold tyres by retail to the public. Consequently the defendants ordered tyres of the plaintiffs' make from D. & Co., and by an agreement purporting to be made between the defendants and D. & Co., in consideration of D. & Co.'s allowing them certain discounts off the plaintiffs' list prices, they agreed *inter alia* not to sell or offer any motor tyres of the plaintiffs' make to any private customer at less than the list prices. The plaintiffs sued the defendants for breach of this con-

tract. In the course of his judgment Viscount Haldane L.C., said at page 853:

"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognized in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it."

Lord Dunedin, in the course of his judgment at page 855 said:

"Now the agreement sued on is an agreement which on the face of it is an agreement between Dew and Selfridge. But speaking for myself, I should have no difficulty in the circumstances of this case in holding it proved that the agreement was truly made by Dew as agent for Dunlop, or in other words that Dunlop was the undisclosed principal, and as such can sue on the agreement. None the less, in order to enforce it he must show consideration, as above defined, moving from Dunlop to Selfridge. In the circumstances, how can he do so?"

Subsequently in *Beswick* v. *Beswick*[6] in the House of Lords, Lord Pearce said there were two cases in the House, *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co., Ltd, supra* and *Midland Silicones Ltd.* v. *Scruttons Ltd.*,[7] which clearly accepted the principle that a third party cannot sue on a contract to which he was not a party. His Lordship also said the majority of the Court of Appeal expressed the view that this principle had been abolished in England by section 56 of the Law of Property Act with which view he did not however agree. In *Beswick* v. *Beswick, supra* by a very informal written agreement Peter Beswick (the deceased) agreed with the appellant to assign to him the goodwill and assets of the business carried on by him in consideration of the appellant employing the deceased as consultant to the business for the remainder of his life at a weekly rate of £6 10s 0d. For the like consideration the appellant agreed to pay to the deceased's widow an annuity to be charged on the business at the rate of £5 per week. The deceased died and the appellant made one payment to the widow and thereafter repudiated his liability to do so. The widow claimed personally and as administratrix of her husband against the appellant for specific performance of the agreement. It was held that the widow, as administratrix of a party to the contract, was entitled to an order for specific performance of the promise made by the nephew and was not limited to recovering merely nominal damages on the basis of the loss to the estate. It was also held further that the widow was not entitled to enforce the obligation in her personal capacity, since section 56 of the Act of 1952, did not effect a fundamental change in the law so as to allow a third party, not a party to a contract, to enforce it.

The present action is for specific performance which is a discretionary remedy exercisable in equity. In equity all that is required is to show circumstances which would justify the intervention by a court of equity. The equitable jurisdiction to order an agreement to be specifically performed is not limited to cases in which at law damages could be recoverable. It is of interest to note that in this case a caveat is in existence in respect of the said land and no action has been taken by the defendants for an order to remove the caveat on the grounds that the plaintiff has no interest in the terms of the Land Code 1965 for capacity to lodge the caveat. It has been well established that as far as our Land Code is concerned the whole system of caveats is founded on the principle that they exist for the protection of *alleged* as well as proved interest and therefore not only is a person who has a right to a registrable interest in land who may enter a caveat but also any person claiming title to it or any registrable interest in any alienated land or even claiming only a right to such title or registrable interest may enter a caveat — see *Mahadevan & Anor.* v. *Patel*,[8] also *Jit Kaur* v. *Parl Singh*,[9] *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh*[10] and *Inter-Continental Mining Co. Sdn. Bhd.* v. *Societe Des Etains De Bayas Tudjuh*.[11]

In *Khatijabai Jiwa Hasham* v. *Zenab*[12] Lord Tucker when delivering the judgment of the Privy Council said at page 329:

"Their Lordships are of opinion that the fallacy of the submission consists in equating the right to sue for specific performance with a cause of action at law. In equity all that is required is to show circumstances which will justify the intervention by a court of equity. The purchaser has an equitable interest in the land and could get an injunction to prevent the vendor disposing of the property."

The arguments of the defendants in the instant case basing on the lack of privity of contract cannot therefore succeed.

It is also the contention of the defendants that the option even if valid had already lapsed before the purported exercise. Alternatively, it was submitted that the option was revoked by the three letters (10, 12 and 13 in Agreed Bundle). The letter (10 in Agreed Bundle) was from the first defendant to PW1 dated December 28, 1973 stating that he had made arrangement to sell the above land to an intending purchaser. The other letters from the first defendant to PW1 dated January 7, 1974 and January 21, 1974 respectively (12 and 13 in Agreed Bundle) stated the same facts again.

Offers are often made for a limited time. In this case it would appear that since no time was fixed the offer would lapse after the expiration of a reasonable time. Section 47 of our Contracts Act, 1950 provides that where no time for performance is specified in a contract the engagement must be performed within reasonable time. The question of what is reasonable time is a question of fact and depends in each case on the circumstances which actually exist and on the nature of the business. An offer lapses after a reasonable time not because this must be implied in the offer but because failure to accept within a reasonable time implies rejection by the offeree. As a consequence, the court can take into account the conduct of the parties after the offer was made in deciding whether the offeree has allowed too long a time lapse before accepting. It may be recalled that PW1 himself said that when they met which resulted in the option in question the option would be exercised only after

Loong Koi showed no interest in proceeding with the agreement. Therefore the exercise of the option was subject to a condition that PW1's client had no interest to pursue the matter any further. Looking at the documents in the Agreed Bundle, I am more inclined to the conclusion that the option was in fact revoked after the letter from PW1 to the First defendant dated December 18, 1973 (9 in Agreed Bundle) wherein it was stated that PW1's client now wished to complete the agreement dated October 16, 1972 to purchase the land. It was in response to this letter that letters in 10, 12 and 13 in Agreed Bundle were written by First defendant to PW1.

The sole purpose of giving a specified time limit in an option is to indicate to the offeree that the offer will lapse automatically if it is not accepted before the expiry of the time limit. In this case the option was an open dated one, that is to say there was no time limit but (as admitted by PW1 himself) exercisable only after Loong Koi showed no more interest in the land. In my view it was also quite probable that as on the date PW1 and first defendant met when the option was executed it appeared to PW1 and was also understood by the first defendant upon representation by PW1 that it was quite possible that Loong Koi would give up the agreement dated October 16, 1972. However as the documents in the Agreed Bundle show this was not as easy as expected for reasons best known only to Loong Koi and PW1. But the important thing is, according to the letter dated December 18, 1973 Loong Koi was, for all intents and purposes (at least as far as must have appeared to the first defendant) determined to proceed with the agreement. Therefore as on December 18, 1973 it was already in the knowledge of PW1 that the condition under which he could exercise the option could no longer come about. Upon receipt of this letter from PW1 the First defendant replied in his letter as in 10 in the Agreed Bundle. Therefore it was at this point in my view that the obligation of the defendants in the option was discharged and the option therefore came to an end. To construe that the option should remain exercisable even after this point would be to extend the option to an unreasonable time.

Therefore even if for one moment that it could be assumed that there was consideration the option had been revoked well before the purported intention to exercise the option as notified to the first defendant in PW1's letter to the defendants dated February 11, 1974 (14 in Agreed Bundle).

On the above considerations it is my view that the plaintiff company must fail in their present action. Basing also on the above considerations it is no longer necessary to consider the other question whether the express condition in the title of the land would by its nature preclude specific performance.

The plaintiffs' claim is dismissed with costs. I also order that the Private Caveat 842/74 on the land held under and comprised in Surat Hakmilek Semantara No. H.S. (D) KA. 691/73 for Lot No. 66133 in the Mukim of Ulu Kinta be removed forthwith.

Claim dismissed.

Solicitors: *H. R. Sankey & Co.; S. A. Lingam & Co.*

F. HOUSING SDN. BHD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Mohamed Azmi J.) February 14, 1976]
[Kuala Lumpur — Originating Motion 3 of 1973]

Income Tax — Land belonging to land development company acquired by government — Whether difference between the collector's award and purchase price assessable to tax — Income Tax Act, 1967, s. 4(a).

In this case land belonging to the appellant company had been acquired by the government. Compensation in the sum of $1,407,139.69 was paid to the appellant company and tax was assessed on the difference between this and the purchase price of the land. The question for determination was whether the difference between the compensation awarded and the purchase price was assessable to income tax under section 4(a) of the Income Tax Act, 1967.

Held: on the facts of the present case, the isolated transaction, although it concerned compulsory acquisition, should lawfully be regarded as a trading transaction and therefore the difference between the acquisition award and the purchase price and cost of the land was income in respect of gains or profits from a business within the meaning of section 4(a) of the Income Tax Act, 1967 and liable to tax.

Cases referred to:—

(1) *Rellim Ltd.* v. *Vise* 32 T.C. 254 at p. 258
(2) *Hudson's Bay Co. Ltd.* v. *Stevens* 5 T.C. 424.
(3) *Liquidator, Paramount Ltd.* v. *Comptroller General of Inland Revenue* (1970) 2 M.L.J. 193.
(4) *Eames* v. *Stepwell Properties Ltd.* 43 T.C. 678 at p. 692.
(5) *Glenboig Union Fireclay Co. Ltd.* v. *Commissioners of Inland Revenue* 12 T.C. 427 at p. 448.
(6) *Californian Oil Products Limited (in liquidation)* v. *Federal Commissioner of Taxation* 52 C.L.R. 28.
(7) *London and Thomas Haven Oil Wharves Ltd.* v. *Attwool* 43 T.C. 491.
(8) *Commissioners of Inland Revenue* v. *Newcastle Breweries Ltd.* 12 T.C. 927.
(9) *Imperial Tobacco Co. Ltd.* v. *Kelly* 25 T.C. 292
(10) *London Investment & Mortgage Co. Ltd.* v. *Worthington* 38 T.C. 86.
(11) *Johnson* v. *W.S. Try Ltd.* 27 T.C. 167.
(12) *Balgownie Land Trust Ltd.* v. *Commissioners of Inland Revenue* 14 T.C. 684 at p. 691.
(13) *Leeming* v. *Jones* 15 T.C. 333.
(14) *E.* v. *Comptroller-General of Inland Revenue* [1970] 2 M.L.J. 117 at p. 123.

CASE STATED.

S. Woodhull for the appellant.

Baharuddin bin Sulaiman (Federal Counsel) for the respondent.

Mohamed Azmi J.: This is an appeal by way of Case Stated against the decision of the Special Commissioners of Income Tax that the sum of $298,837 being the difference between the purchase price and cost paid by the appellants of approximately 93.8 acres of rubber land and the sum awarded by the Collector of Land Revenue, Klang, under the Land Acquisition Act, was chargeable to tax under section 4(a) of the Income Tax Act, 1967. The appellant company, which was registered on March 19, 1965, purchased the land by agreement in September the same year for a sum of $1,104,832 exclusive of costs. The Collector's award was made on March 12, 1968 and compensation in the sum of $1,407,139.69 was paid to the appellant company as market value of the land at the relevant date of acquisition. The tax assessed on the difference amounted to $134,376.65.